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No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1930

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

v.

ERIE COAL & COKE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 508

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-Third District of Pennsylvania, petitioner

v.

ERIE COAL & COKE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 8-12) is reported in 33 F. (2d) 135. The opinion of the Circuit Court of Appeals (R. 16) is reported in 42 F. (2d) 214.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 9, 1930. (R. 17.) The petition for certiorari was granted November 24, 1930.

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The respondent herein filed a claim in abatement of an assessment of additional taxes for the year 1917, which claim was rejected after the expiration of the statutory period for collection. Thereafter the respondent filed a new claim in abatement, accompanied by a bond conditioned upon the payment of any part of the additional taxes found by the Commissioner of Internal Revenue to be due. The claim in abatement was later allowed in part, and the remainder was paid by the respondent under threat of distraint after the expiration of the statutory period for collection and after the enactment of the Revenue Act of 1926. Suit for recovery of the tax so paid was entered in the lower court before the enactment of the Revenue Act of 1928, but the case was tried and judgment was rendered after the enactment of that Act. The questions presented are:

1. Whether the execution of the bond by the respondent deprived it of the right to recover back the taxes collected after the statutory period of limitation for collection had expired.

2. If respondent's execution of the bond does not preclude recovery, whether Section 611 of the Revenue Act of 1928 should be construed to have such effect.

3. Whether Section 611, if so construed, is constitutional.

STATUTES INVOLVED

The statutes involved are contained in the Appendix, *infra*, pp. 17–21.

STATEMENT

Respondent's tentative income and excess-profits tax return for the calendar year 1917 was filed April 1, 1918, and its completed return was filed June 11, 1918. (R. 9.) The tax assessed thereon was paid. In March, 1921, the Commissioner of Internal Revenue assessed an additional tax against respondent for the year 1917 in the sum of $133,252.97. (R. 9.) This assessment was made within the period of limitations. On May 4, 1921, respondent filed as to this additional assessment, a claim in abatement, which was rejected on March 15, 1924. Subsequently, on May 31, 1924, the respondent filed a new claim in abatement to the additional assessment, pursuant to which the assessment was reduced by the sum of $67,546.90 and the balance of the claim for abatement in the sum of $65,706.07 was rejected on March 23, 1926. (R. 9 as explained by stipulation of counsel.) On April 20, 1926, pursuant to notice of distraint, petitioner collected from respondent the balance of $65,706.07. (R. 9.) On April 27, 1927, respondent filed with petitioner a claim for refund of the additional tax collected. The Commissioner of Internal Revenue has not acted upon the claim for refund. (R. 9.)

When respondent filed its claim in abatement on May 31, 1924, the claim was accompanied by a bond conditioned upon the payment by respondent of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment of the sum of $65,706.07, at which time another bond was substituted for it, conditioned upon the payment of interest which is not in issue here. (R. 9, as explained by stipulation of counsel.) The first bond was executed by respondent and a surety in the penal sum of $325,000 and contained the following recitals and conditions (R. 6–7):

> Whereas, the above-bounden principal has been assessed income-profits taxes for the year 1917 and claims that the whole portion thereof has been illegally assessed against it and desires to file a claim for the abatement thereof, and further desires that the collection of the amount covered by said claim for abatement be deferred until such time as that claim has been finally determined by the Commissioner of Internal Revenue; and
>
> Whereas, in case such claim is filed payment of the amount of tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany its claim with a bond in double the amount of the tax covered by the claim, with surety satisfactory to the Commissioner of Internal Revenue, conditioned for the pay-

ment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double the amount of tax covered by such claim for abatement;

Now, therefore the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the Commissioner of Internal Revenue to be due, with interest at the rate of one (1%) per cent and (½%) per cent per month from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

This suit to recover the additional tax paid was instituted in the District Court of the United States for the Western District of Pennsylvania on April 24, 1928. The Revenue Act of 1928 became a law on May 29, 1928. (R. 1.) After that date the case was tried. (R. 4.) The District Court on February 6, 1929, entered judgment for the respondent for $65,706.07 with interest. (R. 13.) This judgment was affirmed by the Circuit Court of Appeals. (R. 17.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In not holding that recovery of the amount in suit was barred because of the execution of a bond conditioned upon payment of the tax.

2. In holding that the provisions of Section 611 of the Revenue Act of 1928 did not preclude a refund or recovery of the amount in suit in this case.

3. In refusing to recognize the power of Congress to specify the conditions under which a recovery may be had of moneys paid to or collected by the United States as taxes.

4. In not holding that Section 1106 (a) of the Revenue Act of 1926 was retroactively repealed by Section 612 of the Revenue Act of 1928.

5. In affirming the judgment of the District Court in favor of the respondent.

SUMMARY OF ARGUMENT

I

By reason of its act in filing a bond with its second claim in abatement, the respondent is prevented from recovering the amounts paid on the ground that the statute of limitations had run against collection at the time such payment was made. The reasoning of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370, when applied to the instant case precludes such recovery. The bond was respondent's contract that it would pay the amount found due by the Commissioner. The fact that the bond given herein was not provided for by statute as in the *Barth case* does not change the result. It none the less represented an unqualified promise to pay and the statute of limitation should not be held to be a defense to a promise which was not subject to the statute. The

fact that the bond was not given until after the period for collection had expired is immaterial. The original liability was not extinguished at the time the contract was made and such liability was sufficient consideration for the new promise to pay.

II

Even if the filing of the bond does not prevent recovery, the case comes within the terms of Section 611 of the Revenue Act of 1928, which presents an effective defense to the suit. The validity of Section 611 as a defense with respect to facts similar to those in the instant case is argued in the briefs for the government in *Graham and Foster* v. *Goodcell*, No. 36, October Term, 1930, and *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, which are now before the Court. Counsel for the respondent herein have been furnished with the Government's briefs in those two cases, and to avoid repetition the petitioner here refers to the arguments therein.

ARGUMENT

I

BY EXECUTING A BOND CONDITIONED UPON THE PAYMENT WITH INTEREST OF ANY PART OF THE 1917 TAXES FOUND BY THE COMMISSIONER TO BE DUE, THE RESPONDENT IS PRECLUDED FROM RECOVERING SUCH TAXES ON THE GROUND THAT THEY WERE BARRED BY THE STATUTE OF LIMITATIONS AT TIME OF PAYMENT

An additional tax in the amount of $133,252.97 was assessed against the respondent within the proper period for assessment. Part of this assess-

ment was collected by the petitioner after the statute of limitations had run against collection and at a time when the Revenue Act of 1926 was in effect, Section 1106 (a) of which provided in part that the bar of the statute of limitations against the United States in respect of any internal-revenue tax should not only operate to bar the remedy but should extinguish the liability. (P. 20, *infra*.) It is apparent, therefore, that, except for the bond and the statute hereinafter mentioned, the petitioner would have the right to recover the taxes so collected upon the ground that such collection was barred by the statute of limitations.

On May 4, 1921, the respondent filed a claim for abatement of the additional assessment; this was rejected March 15, 1924. Subsequently, on May 31, 1924, the respondent filed a new claim in abatement. This claim was accompanied by a bond executed by the respondent and a surety, reciting that it was desired to postpone collection of the amount covered by the claim until such time as that claim should finally be determined by the Commissioner and conditioned upon the payment by the respondent, on notice and demand by the collector, of any part of such tax found by the Commissioner of Internal Revenue to be due, with interest from the time such tax would have been due had no such claim been filed. The tax was paid while the bond was in effect. It is the petitioner' position that by reason of the respondent's filing of this bond it can

not now recover on the ground that at the time of collection the statute of limitations had run or that its liability was extinguished.

In *United States* v. *John Barth Co.*, 279 U. S. 370, the Commissioner had assessed income and profits taxes against the Barth Company for the year 1919. That company filed claims for abatement of a portion of the taxes assessed, and, in consideration of the Government's refraining from the collection of such portion, executed a bond, binding it and its surety to pay on notice and demand by the collector any part of such tax found by the Commissioner to be due with interest from the time such tax would have been due had no such claim been filed. After the enactment of the Revenue Act of 1926 and after the expiration of the statutory period of limitation for collection, the Commissioner allowed part of the claim and requested payment of the balance from the taxpayer and its surety. Upon their failure to pay, the United States entered suit on the bond. The Barth Company demurred to the petition on the ground that the statute of limitation for collection had run. This Court held that the statute of limitations did not apply to the right to collect taxes found to be due arising from the contract under the bond, and said (p. 376):

> To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily

> to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax, but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

The instant case differs from the *Barth case* in that (1) in that case the bond was one provided for by statute, while here the bond was not; (2) in that case the bond was given before the statutory period for collection had expired, while here it was given after the expiration of that period; and (3) in that here there is no suit on the bond itself but the taxpayer has paid the amount without suit. We submit that nevertheless the respondent here is precluded from any recovery based on the running of the statute of limitations.

(1) The fact that the bond in the *Barth case* was provided for by statute does not affect the application of that decision to the instant case. Cf. *United States* v. *Linn*, 15 Pet. 290; *United States* v. *Hodson*, 10 Wall. 395. A bond given for the security of the Government, which is not in violation of law, may be valid though no statute directs its delivery. *Moses* v. *United States*, 166 U. S. 571, 586. Cf. *Findlay* v. *United States*, 225 Fed. 337, 345. It is not apparent that this Court in deciding the *Barth*

case intended to stress the specific form of contract which was made.

(2) Nor is it material that the bond in this case was given after the statute of limitations for collection had run.[1] The contract was supported by consideration. At the time the bond was executed the liability for the tax had not been extinguished. The mere running of the statute of limitations against collection did not have such effect. *Campbell* v. *Holt*, 115 U. S. 620; *Campbell* v. *Haverhill*, 155 U. S. 610, 618. The original debt is a sufficient consideration for a subsequent new promise to pay made either before or after the bar of the statute is complete. *Shepherd* v. *Thompson*, 122 U. S. 231, 235. Moreover, in addition to the fact that the moral obligation is a sufficient consideration for a valid promise, it is apparent that the respondent received a real benefit in the allowance of more than one-half of its claim. If, as the Government contends in *Stange* v. *United States*, No. 23, present Term, and the cases heard immediately after it, a waiver of collection of a tax executed by the taxpayer after the statutory period has run is valid, it would seem to follow that a bond conditioned on payment of the tax is valid, even though executed after the statutory period for collections has expired.

---

[1] In *United States* v. *E. Hogshire, Son & Co.*, 37 F. (2d) 720 (E. D. Va.), it was held that suit might be maintained on a bond given after the statute had run. *United States* v. *Drew*, decided September 28, 1929 (S. D. N. Y.), unreported, is *contra*.

(3) We submit that it is immaterial that the taxpayer paid the amount in dispute because of a threat of distraint and not as the result of a suit on the bond. If, as we contend above, the bond was a valid promise to pay the amount found due, it gave the Government a right independent of any right to collect the tax as such. On these assumptions, if suit had been brought on the bond, the statute of limitations would not have been a defense. *United States* v. *John Barth Co.*, 279 U. S. 370, *supra*. If the taxpayer was liable under the bond it could not, by paying the tax as such and obtaining cancellation of the bond, restore itself to the position in which it would have been if no bond had been given. And if the respondent was liable to make the payment in question under the bond, the fact that the Government collected by threat of distraint gives the taxpayer no right to recovery. The arguments in behalf of the taxpayer just suggested were overruled in *Austin Co.* v. *Commissioner of Internal Revenue*, 35 F. (2d) 910 (C. C. A. 6th) certiorari denied, 281 U. S. 735; and in *Oak Worsted Mills* v. *United States*, 68 C. Cls. 539, in which a review of this point was denied by this Court, although certiorari was granted as to another point. 281 U. S. 717. See also *Champ Spring Co.* v. *United States*, 38 F. (2d) 988 (E. D. Mo.).

Roberts Sash & Door Co. v. *United States*, 38 F. (2d) 716 (C. Cls.), pending on certiorari before this Court as No. 97, present Term, is in point.

There the court refused to allow a taxpayer to recover an amount which had been collected ~~as a tax~~ after the time for collection expired, because of the fact that a bond conditioned on the payment of the tax was outstanding. ~~The only possible distinction between that case and the instant case is that~~ In the *Roberts case* the bond was given before the period for collection expired. Cf. *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309 (C. Cls.), pending before this Court on certiorari as No. 400, present Term.

We conclude, therefore, that the respondent may not now use the fact that the statute had run as a means for recovering a payment which the respondent had, by contract, bound itself to make.

II

SECTION 611 OF THE REVENUE ACT OF 1928, WHEN PROPERLY CONSTRUED, EFFECTIVELY PRECLUDES RECOVERY HEREIN BY THE RESPONDENT AND, AS SO CONSTRUED, IS CONSTITUTIONAL

Neither the District Court nor the Circuit Court of Appeals expressed any opinion as to the effect of the bond given by the respondent. Both courts held that since the sum was illegally collected it could be recovered by the respondent and that Section 611 of the Revenue Act of 1928 did not furnish the petitioner with a defense against recovery. The petitioner contends that even if it should be held that the execution of the bond did not prevent a

recovery of the amount paid out of time, nevertheless the facts of this case bring it clearly within the terms of Section 611 of the Revenue Act of 1928 and that that section is a complete and effective defense to the suit herein. Section 611 (p. 21, *infra*) provides in substance that if a tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed with or without bond and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of the Act) should not be considered as an overpayment under the provisions of Section 607 of the Act, relating to payments made after the expiration of the period of limitation on assessment and collection.

In the instant case the tax was assessed in time and before June 2, 1924. Claims in abatement were filed, and the collection was stayed until after the second claim was finally decided. This collection was made before the enactment of the Revenue Act of 1928. With regard to the application of Section 611, these facts are similar to those in *Graham and Foster* v. *Goodcell*, now before this Court, No. 36, present term. In that case the collector as respondent contends that Section 611 was intended to prevent repayment of any amounts which had been assessed within time and prior to June 2, 1924, and where a claim in abatement had been filed and col-

lection stayed. The argument for the collector in the *Graham and Foster case* is applicable to the position of the collector as petitioner in the instant case. There are only two points of difference between this case and the *Graham and Foster case,* aside from the question of the bond, which is not there present.

The first difference is that the claim in abatement herein was not rejected until after the statute had run; hence there is no room for argument here that, since the collector had a period of time after the claim was rejected within which he might collect, Section 611 does not apply.

The other question is whether Section 611 is applicable and, if applicable, is constitutional in view of the fact that the taxes were collected during the life of Section 1106 (a) of the Revenue Act of 1926 (p. 20, *infra*) providing that the bar of the statute of limitations should not only operate to bar the remedy but should extinguish the liability. This question is fully argued in the brief for the United States in *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, which is to be heard immediately preceding the instant case. The respondent herein has been supplied with copies of the Government's brief in the *Graham and Foster* and the *Wyman, Partridge & Co. cases.* To avoid repetition of the entire argument contained in those cases we refer the Court to the briefs filed for the Government therein.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER, 1930.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not effect suits or proceedings begun at the time of the passage of this Act: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 299:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. Title 26, Sec. 1057.)

SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C. Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment

made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C. Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 113:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court began before the en-

actment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App., Title 26, Sec. 1062.)

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App., Title 26, Sec. 1249.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C. Sup. III, Title 26, Sec. 2611.)

SEC. 612. REPEAL OF SECTION 1106 (A) OF 1926 ACT

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C. Sup. III, Title 26, Sec. 2612.)

U. S. GOVERNMENT PRINTING OFFICE: 1939